Supreme Court, U.S.
FILED
APR 1 1993
OFFICE OF THE CLERK

92-1003

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

In re EDWARD RONWIN,

Petitioner.

PETITION FOR WRIT OF MANDAMUS

Edward Ronwin
P.O. Box 88746
Sioux Falls, SD 57105
(605) 338-3924
Petitioner pro se and
Attorney at Law (Iowa)

QUESTION FOR REVIEW

Can a federal judge order publication of a decision or persist in such order when the judge has undisputable evidence that the decision contains untrue premises as the basis for dismissal of claims?

OTHER PARTIES BELOW

The other parties below are: Hon. WILLIAM G. CAMBRIDGE, Judge, United States District Court, District of Nebraska. SMITH BARNEY, HARRIS UPHAM & CO., INC. and JOHN SPAUSTAT, Defendants, in Ronwin v. Smith Barney, et al., No. 8:CV 92-232, United States District Court, District of Nebraska.

TABLE OF CONTENTS

	Page
Question for Review	i
Other Parties Below	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for the Writ	5
As to Count I	6
As to Count II	10
Conclusion	17
Appendix	

TABLE OF AUTHORITIES

	Page
Cases	
Dirks v. SEC, 681 F.2d 824 (10th Cir. 1982); rev'd other gds, 463 U.S. 646 (1983)	13
Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375 (1976)	13
In re Ronwin, Court of Appeals, 8th Cir., No. 92-3878	5
Kennett v. Chambers, 55 U.S. 38, 14 L.Ed. 316 (1852)	14
Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, 473 U.S. 614 (1985)	9
Rodriques de Quijas v. Shearson/ American Express, Inc., 490 U. S. 477, 109 S.Ct. 1917 (1989)	9,11-13
Ronwin v. Smith Barney et al., No. 8:CV 92-232, U.S. Dist. Ct., Dist. Neb.; became 807 F.Supp. 87 (D.Neb. 1992)	i,2, 7,11
Ronwin v. Smith Barney, et al., U.S. Court of Appeals, 8th Cir., No. 92-3788	5
Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332 (1987)	9,11,12
U.S. v. Holzer, 816 F.2d 304 (7th Cir. 1987), 484 U.S. 807, 108 S.Ct. 53; on remand (other gds) 840 F.2d 1343; 486 U.S. 1035, 108 S.Ct. 2022	15,16

TABLE OF AUTHORITIES - CONT'D.

	Page
Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182 (1953)	14
United States Constitution	
Article III, Section 1	2,16
United States Code	
9 U.S.C.:	
Sec. 1, et seq.	10
15 U.S.C.:	
Sec. 77a	11
Sec. 77n	11,14
Sec. 77v	4,10,12,13
Sec. 78a	11
Sec. 78aa	4,10,12,13
Sec. 78cc	11,14
28 U.S.C.:	
Sec. 1254(1)	2
Sec. 1291	4
Sec. 1294	4
Sec. 1331	4
Sec. 1332	4
Sec. 1337	4
Sec. 1367	4
Sec. 1651(a)	2,3

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

In re EDWARD RONWIN,
Petitioner.

PETITION FOR WRIT OF MANDAMUS

OPINIONS BELOW

On December 29, 1992, the Court of Appeals, Eighth Circuit, entered an unpublished Order denying Petitioner's, ("RONWIN"), Petition for a Writ of Prohibition and a Writ of Mandamus, ("petition for the writs"); see Appendix. Subsequently, the Court of Appeals entered an Order on February 4, 1993, denying RONWIN's Petition for Rehearing; see Appendix.

On October 29, 1992, the United States District Court for the District of Nebraska entered an Entry of Judgment and a separate

Order and Memorandum, ("OPINION"), copy reproduced in the Appendix. OPINION has now been published at 807 F.Supp. 87 (D. Neb. 1992).

JURISDICTION

RONWIN filed a timely Notice of Appeal from OPINION and Entry of Judgment. The Court of Appeals' Orders, mentioned above, on RONWIN's petition for the writs arose out of an ancillary matter which the Court of Appeals treated as separate from the appeal of OPINION. This Petition for a Writ of Mandamus is filed within 90 days after February 4, 1993, and this Court's jurisdiction is invoked under 28 U.S.C., Secs. 1254(1) and 1651(a).

STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. III, Sec. 1:

...The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior,...

United States Code, Title 28, Sec. 1651(a),

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

On January 15, 1992, RONWIN executed a customer agreement with SMITH BARNEY, HARRIS UPHAM & CO., INC., ("SB," which will include as the use implies SB's Omaha office manager, JOHN SPAUSTAT, ("SPAUSTAT")), for a cash only securities account. Prior to entering the agreement, RONWIN objected to the pre-dispute arbitration clause and SB's representatives agreed to delete same. Later that day, SPAUSTAT reversed SB's position and after further interaction between SB and RONWIN, SB refused service to RONWIN and unilaterally closed the account.

On May 6, 1992, RONWIN filed a four-Count

Complaint: Count I, [unenforceable] contract of adhesion; Count II, violation of Securities Acts; Count III, breach of contract and Count IV, breach of fiduciary duty. The jurisdictional bases pled were: 15 U.S.C., Secs. 77v and 78aa; 28 U.S.C., Secs. 1331, 1332, 1337 and 1367. SB met the Complaint with a motion to dismiss and to strike and RONWIN filed a motion for partial summary judgment. On October 29, 1992, the District Court entered Judgement and OPINION. A timely notice of appeal was filed on November 30, 1992. Jurisdiction in the Court of Appeals was based on 28 U.S.C., Secs. 1291 and 1294. By letter dated Nov. 5, 1992, SB requested Judge CAMBRIDGE to publish OPINION for its alleged "precedential value." By letter dated Dec. 4, 1992, RONWIN opposed publication on the grounds that the positions alleged in OPINION to be RONWIN's and alleged as the bases for dismissal of Counts

I and II, and partially for dismissal of the other Counts, were not truthful nor were said untrue positions to be found anywhere in the record. In fact, the opposite was the case. Soon after learning from Judge CAMBRIDGE's secretary that the Judge had ordered publication of OPINION, and failing to receive a response to his letter, and on or about Dec. 21, 1992, RONWIN filed the petition for the writs in the Court of Appeals, which treated same as a separate action, No. 92-3878. The petition for the writs was denied on Dec. 29, 1992. RONWIN filed a timely petition for rehearing on January 18, 1993 and on February 4, 1993, the Court of Appeals denied same.

REASONS FOR THE WRIT

The underlying Appeal, No. 92-3788, is separate and apart from the issue on this Petition. As discussed below, the stated reasons in OPINION for the dismissals of Counts I and II of the Complaint are abso-

lutely untrue. Nevertheless, the Court of Appeals can still determine that the dismissals of said Counts were proper even if the District Court stated untrue reasons. This Court is not being asked to make that determination at this time. Rather, this Court is being asked whether or not a federal judge can persist with his/her Order to publish his/her decision if he/she had sufficient information to know that at the time that publication is ordered, or shortly thereafter, the decision is premised on stated, but untruthful reasons. The denials of the petition for the writs and for rehearing signify the Court of Appeals' determination that a federal judge can knowingly persist in publishing a decision with stated, but untruthful premises for dismissing claims. For the reasons given below, RONWIN disagrees and urges that the Writ sought hereby be issued.

As to Count I:

Judge CAMBRIDGE alleged in OPINION, pp. 3-4; 807 F.Supp. @89:

> Ronwin has made no allegation of unconscionability separate from the general assertion that the predispute arbitration clause is a contract of adhesion, and the apparent, albeit erroneous, presumption that all such clauses are inherently unconscionable. Count I of the complaint must accordingly be dismissed for failure to state a claim.

The first sentence quoted above is untrue. In Count I, RONWIN pled, Para. XVII, pp. 5-6:

> The actions of the Defendants in demanding as a condition for the provision of their Federal and State regulated services,...RONWIN and any other prospective customer unconditionally accept said pre-dispute arbitration clause, and thereby denying RONWIN..., the free choice of whether or not to agree to said pre-dispute arbitration clause, whether for a cash or a margin account, and denying to RONWIN,...the right to seek redress of grievances ...in the Courts of the United States and/or in the Courts of the several states, constitute a contract of adhesion and/or an impermissible demand for same, and said action by SB is against public policy, unenforceable and an unconscionable business tactic. (First emphasis added; other emphasis in RONWIN's letter of Dec. 4, 1992 to Judge CAMBRIDGE).

As noted on p.2, RONWIN's letter of Dec. 4, 1992 to Judge CAMBRIDGE, RONWIN did not plead that all broker-customer agreements containing predispute arbitration clauses are "contracts of adhesion" and, consequently, "inherently unconscionable"; rather, RONWIN pled that the reason the predispute arbitration clause in SB's customer agreement becomes a "contract of adhesion" and an "unconscionable business tactic" is that, as RONWIN had pled, SB refuses service to RONWIN unless RONWIN "unconditionally accepts said predispute arbitration clause."

There was no pleading by RONWIN, apparent or otherwise, of an "albeit erroneous, presumption that all such [predispute arbitration] clauses are inherently unconscionable;" p.2, said letter.

As also noted on pp.2-3, said letter, RONWIN amplified on the above theme in "[RONWIN'] Brief in Support of [RONWIN's]

Response to Defendants' Motions to Dismiss and to Strike," bringing to Judge CAMBRIDGE's attention that the case of Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, 473 U.S. 614, 628 (1985), comprehends a "bargain to arbitrate", and that this Court in Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 482-483, 109 S.Ct. 1917, 1921 (1989),recognizes "the broader right" of the "buyers of securities..to select the forum for resolving disputes, whether it be judicial or otherwise." Following that, RONWIN explained in said letter, p.3, the gist of the Rodriquez case and the case of Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332 (1987), which is that where an agreement containing a predispute arbitration clause is freely executed by the brokerage house customers, such agreements must be honored, but RONWIN added that said theme was of "no import" to RONWIN's case;

(referring Judge CAMBRIDGE to pp. 6-7, said Brief). The foregoing arguments were then summarized as follows, p. 7, said Brief, and p. 3, said letter:

> ...To emphasize the point: The Complaint does not challenge the provisions of the Federal Arbitration Act, 9 U.S.C., Sec. 1, et seq.; and agrees that an arbitral forum can replace a statutorily provided judicial forum in the securities area, as in other fields, but, the Complaint insists in line with Rodriquez that the agreement to arbitrate must be an unfettered choice of the customer and not required as a non-negotiable demand by the broker/dealers... (Emphasis in said letter, p.3).

As to Count II:

Judge CAMBRIDGE contended with respect to Count II that, p. 4, OPINION; 807 F. Supp. @89:

> The essence of Ronwin's contention is that these Acts, at Sec. 22 of the Securities Act of 1933 (15 U.S.C., Sec. 77v) and at Sec. 27 of the Securities Exchange Act of 1934 (15 U.S.C., Sec. 78aa), vest exclusive jurisdiction for violations of the respective Acts in the district courts of the United States; the predispute arbitration clause, Ronwin argues, constitutes a waiver of compliance with those respective provisions,..

And, upon which contention Judge CAMBRIDGE based his dismissal of Count II, p.5, OPINION; 807 F.Supp. @90.

Proof that Judge CAMBRIDGE's contention with respect to Count II was not only incorrect, but utterly contrary to RONWIN's stated position, is found at p. 9, said Brief, which RONWIN quoted at p. 4 in said letter, as follows:

> Thus, the element central to both McMahon and Rodriquez reduced to a question of whether the arbitration clause accepted by the customers in each case could be enforced to require the customer-claimants to arbitrate the disputes each had with the broker/dealer, (the same firm in both cases), and which arose in each case subsequent to the execution of the respective customer agreements or whether the right to a judicial forum provided in 15 U.S.C., Sec 77a, et seq., and 15 U.S.C., Sec. 78a, et seq., excluded arbitral forums pursuant to the provisions of 15 U.S.C, Sec. 77n and 15 U.S.C., Sec. 78cc, respectively. That question is not an issue, central or otherwise, in this action. (Emphasis in said letter).

Can there be any doubt that the very premise, quoted above, upon which Judge CAMBRIDGE based his dismissal of Count II

was specifically identified as not an issue in RONWIN's action?

Rather, RONWIN's argument quoted above at 10, (p. 4, said letter), was that:

> ..the Complaint insists in line with Rodriquez that the agreement to arbitrate must be an unfettered choice of the customer and not required as a non-negotiable demand by the broker/dealers.

In the Dec. 4, 1992, letter, pp. 4-5, RONWIN called Judge CAMBRIDGE's attention to RONWIN's arguments on pp. 12-22 of said Brief in which section RONWIN presented his arguments on Count II to Judge CAMBRIDGE in significant detail and presented an explanation therein of what was being violated by SB's actions of which RONWIN complained, as found in said Brief at pp. 17-18 and as reproduced on p. 5, said letter and as follows:

> The Courts have not voided Secs. 77v and 78aa. Certainly McMahon and Rodriquez did not do so; rather, the U.S. Supreme Court simply approved arbitral forums as an acceptable alternative to, not as a replacement of,

judicial forums. In fact, as was related at p. 6 [in said Brief], the U.S. Supreme Court in Rodriquez made it very clear that the Court's condonation of the arbitral forum in securities cases served, 109 S.Ct. @1921:

> ..to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise...

In this case, RONWIN exercised his right to [reserve the right to] demand a judicial forum for [future] dispute resolution between RONWIN and SB; SB refused to respect that right. (Bracketted phrases added here. At the initiation of the securities account, there existed no dispute requiring immediate forum selection as part of the SB/RONWIN agreement).

Under the exposition of Congressional purpose, Dirks [v. SEC, 681 F.2d 824, 840 (10th Cir. 1982), rev'd other gds, 463 U.S. 646 (1983)], and the recognition thereof by [this Court], Ernst & Ernst [v. Hochfelder, 425 U.S. 185, 194-195, 96 S.Ct. 1375, 1381-1382 (1976)]...Rodriquez, [490 U.S. 484, 109 S.Ct. 1921], [SB] had no equivalent right; rather, [SB], as all broker/dealers, have a duty, fiduciary or otherwise, to protect and respect customer rights under the Securities Acts of 1933 and 1934, among which is the right given by 15 U.S.C., Secs.77v and 78aa to a judicial forum for

> dispute resolution. Failure by broker/dealers to protect and respect that customer right, as when the broker/dealer forces a contract on the customer which denies that right, and public policy of the U.S., or, alternatively refuses service unless the customer accepts a denial of the customer's right to free choice of dispute resolution form (sic), and denial of the public policy of the U.S., is a failure to comply with the Securities Acts of 1933 and 1934 and constitutes a violation of Secs. 77n and 78cc(a) and (b). And such contracts or refusals of contract are unenforceable contracts of adhesion, (Justice FRANKFURTER's dissent), Wilko [v. Swan, 346 U.S. 427, 440, 74 S.Ct. 182, 189 (1953)], ..as well as actions void as against public policy of the United States, Kennett [v. Chambers, 55 U.S. 38, 51, 14 L.Ed. 316 (1852)]. (Emphasis as in Ronwin's letter, 12/4/92).

Again, can there be any doubt that the substance of RONWIN's position on Count II of the Complaint is utterly at odds with what Judge CAMBRIDGE alleged in OPINION as the basis of Count II?

Nowhere in the record below are there to be found the premises for Counts I and II attributed to RONWIN by Judge CAMBRIDGE.

The entire foregoing argument was presented to the Court of Appeals in the petition for the writs and for rehearing.

In U.S. v. Holzer, 816 F.2d 304, 307 (7th Cir. 1987), 484 U.S. 807, 108 S.Ct. 53; on remand (other gds), 840 F.2d 1343; 486 U.S. 1035, 108 S.Ct. 2022, the Court declared:

> Fraud...includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud...

This matter pivots on a single theme: Preliminarily, it is of no value to argue that if the Court of Appeals, in acting on the related appeal, should reverse, the net effect will be to nullify the published OPINION. Of more critical import is the notion that no federal judge may knowingly perpetrate a fraud. Reduced to its basic essence, the publication of a

judge's decision which contains essential material that the judge has ample reason to know is untrue, and thereby to present that untruthful material as a precedent or part thereof, is a fraud on the public, as well as an unethical and unconscionable act, inconsistent with the standards governing judicial conduct, Holzer, supra, as well as inconsistent with the United States Constitution's requirement that federal judges hold their life tenure on "good Behavior," Art. III, Section 1, U.S. Constitution.

Alternatively, the theme is: error by a judge is lawful; deliberate error by a judge is unlawful.

Having exhausted all judicial avenues below, this Court is now the Court of last resort on this matter and this Petition presents this Court with an exceptional circumstance of arch import to judicial conduct and ethics warranting

the exercise of this Court's discretionary powers.

CONCLUSION

For the foregoing reasons, this Court is asked to issue a Writ of Mandamus requiring Judge CAMBRIDGE to order WEST PUBLISHING COMPANY to publish a retraction of OPINION.

Respectfully submitted

Edward Ronwin
P.O. Box 88746
Sioux Falls, SD 57105
(605) 338-3924
Petitioner pro se and
Attorney at Law (Iowa)

Date: March 26, 1993

(Appendix follows)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3878NEO

In re: Edward Ronwin, Petitioner. * Petition for Writ of Prohibition/ Mandamus

Judgement

Petition for writ of prohibition/mandamus has been considered by the court and is denied.

December 29, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3878

In re: Edward Ronwin, Petitioner. * Petition for Writ of Prohibition/ Mandamus

Petitioner is hereby granted to and including January 28, 1993, within which to file a petition for rehearing.

Order Entered Under Rule 27B
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3878NEO	*
	* Appeal from the
In re Edward Ronwin,	* United States
Petitioner.	* District Court for
	* the District of
	* Nebraska
	*

The petition for rehearing by the panel is denied.

February 4, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EDWARD RONWIN, d/b/a Plaintiff, vs. SMITH BARNEY, HARRIS UPHAM & CO., INC., and JOHN SPAUSTAT, Defendants.	8:CV92-00232 **MEMORANDUM and ORDER**

THIS MATTER is before the Court on the Defendants' motion to dismiss and to strike (Filing No. 13). For the reasons

set out below, this action will be dismissed, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim.

The plaintiff in this action, Edward Ronwin, doing business as Index Investments, alleges (Filing No. 1) that he had sought to open a securities account with defendant Smith Barney, Harris Upham & Co., Inc.; defendant John Spaustat is and was, at all times relevant, resident manager of Smith Barney's Omaha office. Ronwin alleges that he was initially permitted to open a cash account without signing an agreement containing a predispute arbitration agreement, but that Smith Barney later determined that it would not permit him to have an account without such an arbitration agreement and returned his money. Ronwin further alleges that he was damaged by the defendants' refusal to do business with him on his terms.

He seeks to recover compensatory and punitive damages and attorney fees, as well as injunctive relief.

Jurisdiction is asserted upon the bases of the existence of a federal question (28 U.S.C., Sec. 1331), diversity of citizenship (28 U.S.C., Sec 1332), commerce and antitrust regulations (28 U.S.C., Sec. 1337), upon supplemental jurisdiction pursuant to 28 U.S.C., Sec. 1367, and upon the Securities Act of 1933 (15 U.S.C., Sec. 77v) and the Securities Exchange Act of 1934 (15 U.S.C., Sec. 78aa).

The standards for dismissal pursuant to Rule 12(b)(6) are well established. In considering a motion to dismiss under F.R.Civ.P. 12(b)(6), the allegations in the complaint must be viewed in the light most favorable to the plaintiff. Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982). "[A] complaint should not be dismissed for failure to state a claim unless it appears be-

yond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes some insuperable bar to relief." Jackson Sawmill Co. v. United States, 580 F.2d 302, 306 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979).

The Court finds this to be such a case.

In the first count of his complaint, Ronwin asserts that the defendants' insistence that he agree to the predispute arbitration clause as a condition of doing business with Smith Barney constitutes an attempt to impose an unenforceable contract of adhesion. He accordingly seeks to have Smith Barney enjoined from requiring such clauses as a prerequisite for accepting accounts, and seeks unspecified compensatory

and punitive damages, as well as attorney fees and costs.

This count of the plaintiff's complaint rests upon an erroneous presumption and must therefore be dismissed. The defendants do not deny, and this Court finds, that the contract in question is a contract of adhesion. Such contracts may be said to exist where, as here, a standardized form of agreement, drafted by the party with superior bargaining power, is presented to a party on a take it or leave it basis. As the plaintiff points out, and the defendants do not dispute, insistence upon such predispute arbitration clauses are an industry-wide practice.

However, the mere fact that a contract falls under the rubric of the adhesion doctrine does not make it unenforceable. See, e.g. Webb v. R. Rowland & Co., 800 F.2d 803, 807 (8th Cir. 1986) ("the use of a standard form contract between two parties of admittedly unequal bargaining

power does not invalidate an otherwise valid contractual provision. To be invalid, the provision at issue must be unconscionable"). See also Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F.Supp. 1505, 1512 (S.D.N.Y. 1985) (holding that such contracts may be considered contracts of adhesion but are nonetheless enforceable in the absence of a showing of "unfairness, undue oppression or unconscionability").

Ronwin has made no allegation of unconscionability separate from that the (sic) general assertion that the predispute arbitration clause is a contract of adhesion, and the apparent, albeit erroneous, presumption that all such clauses are inherently unconscionable. Count I of the complaint must accordingly be dismissed for failure to state a claim.

In Count II of his complaint, Ronwin alleges that the defendants' insistence upon

the predispute arbitration clause was an attempt to impose a condition that violates Sec. 14 of the Securities Act of 1933 (15 U.S.C., Sec. 77n) and Sec. 29(a) of the Securities Exchange Act of 1934 (15 U.S.C., Sec 78cc). Each of those provisions forbids the imposition of "any condition, stipulation or provision binding any person to waive compliance with any provision [of the respective Acts]". Ronwin asserts that the predispute arbitration clause falls within those proscriptions. In this Count, Ronwin seeks compensatory and punitive damages, injunctive relief, and an award of attorney fees and costs.

The essence of Ronwin's contention is that these Acts, at Sec. 22 of the Securities Act of 1933 (15 U.S.C., Sec. 77v) and at Sec. 27 of the Securities Exchange Act of 1934 (15 U.S.C., Sec. 78aa), vest exclusive jurisdiction for violations of the respective Acts in the district courts

of the United States; the predispute arbitration clause, Ronwin argues, constitutes a waiver of compliance with those respective provisions.

This argument, in the context of the Securities Exchange Act of 1934, was considered and rejected by the Supreme Court of the United States in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). In McMahon the Court reasoned that

> The McMahons contend that an agreement to waive this jurisdictional provision is unenforceable because Sec. 29(a) voids the waiver of "any provision" of the Exchange Act. The language of Sec. 29(a), however, does not reach so far. What the anti-waiver provision of Sec. 29(a) forbids is enforcement of agreements to waive "compliance" with the provisions of the statute. But Sec. 27 itself does not impose any duty with which persons trading in securities must "comply." But its terms, Sec. 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because Sec. 27 does not impose any statutory duties, its waiver does not constitute a waiver of "compliance with any provision" of the Exchange Act under Sec. 29(a).

482 U.S. at 228. The Supreme Court expressly adapted that same reasoning to the Securities Act of 1933 in Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). The predispute arbitration clause insisted upon by the defendants simply does not contravene the respective Acts; Count II of Ronwin's complaint must accordingly be dismissed for failure to state a claim.

The two remaining Counts of the plaintiff's complaint are based upon common law claims of breach of contract and breach of fiduciary duties. Having dismissed the Counts of the plaintiff's complaint which would have established jurisdiction on the basis of a federal question, securities laws or antitrust laws, or which would have provided a basis for supplemental jurisdiction, the Court must face the question of whether diversity jurisdiction remains pursuant to 28 U.S.C., Sec. 1332.

As further explained below, the Court finds that it does.

The burden of proof on a Rule 12(b)(1) motion is upon the party asserting jurisdiction. Estate of Blakely v. Asbestos Corp., 766 F.Supp. 721 (E.D. Ark. 1991); 12 Wright and Miller, Federal Practice & Procedure, Sec. 1350 (1990). Ronwin has clearly pled diversity among the parties (Filing No. 1 at Paras. II, III and IV), but has pled damages only "in an amount to be determined at trial" (Filing No. 1 at Paras. XVIII, XXI, XXIV, and the prayer for relief). Although the Court has serious doubts that the plaintiff would recover an amount in excess of Sec. 1332's $50,000 amount in controvery requirement, the Court is also cognizant that "the claim is deemed to have been made in good faith so long as it is not clear to a legal certainty that the claimant could not recover a judgment exceeding the jurisdictional amount."

Id. at 231. Accordingly, the Court holds that diversity jurisdiction exists.

Nonetheless, the Court further finds that these remaining two counts should be dismissed for failure to state a claim. Count III is a breach of contract claim in which Ronwin alleges that Smith Barney's refusal to permit Ronwin to participate in an account without a predispute arbitration agreement constituted a breach of the agreement for a cash account. However, it is uncontroverted that Smith Barney returned Ronwin's funds and the account was closed. See, e.g., Complaint (Filing No. 1) at Para. XV. Assuming arguendo that a contract had existed, Smith Barney clearly had the right to end the contract in the manner it did.

Notice to this Supreme Court:

The following portion of the decision did not appear on the pages supplied by the District Clerk's office, but was taken

from the published decision at 807 F.Supp. @90:

"The general rule is that contracts having no fixed term are terminable at will by either party." Martin v. Equitable Life Assurance Soc. of the United States, 553 F.2d 573, 574 (8th Cir.

End of portion missing from the copy of the decision distributed by the District Court Clerk's office.

1977); See also Federal Deposit Insurance Corp. v. Northwood Projects, Inc., 95 Misc.2d 373, 407 N.Y.S.2d 424 (1978) and Muller Enterprises v. Samuel Gerber, Advertising Agency, Inc., 182 Neb. 261, 153 N.W.2d 920 (8th Cir. 1967) (sic). Again, the plaintiff has failed to state a claim upon which relief could be granted.

Ronwin's fourth and final Count is premised upon an alleged breach of fiduciary duty. Assuming arguendo that a fiduciary relationship existed, Ronwin has simply

failed, for the reasons described above, to allege any circumstances that could conceivably constitute a breach of any fiduciary duty. This Count, like the others, must be dismissed for failure to state a claim. Accordingly,

(1) the motion on to (sic) dismiss (Filing No. 13) is granted;

(2) the plaintiff's motion for partial summary judgment (Filing No. 21) is denied as moot; and

(3) an Order of Dismissal consistent with this Memorandum and Order will be entered this date.

DATED this 29 day of October, 1992.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE,
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EDWARD RONWIN, d/b/a (sic)) Plaintiff, vs. SMITH BARNEY, HARRIS UPHAM & CO., INC., and JOHN SPAUSTAT, Defendants.	) 8:CV92-00232)) **ENTRY OF JUDGMENT** (Filed Oct. 29, 1992)

In accordance with the Order entered this date, IT IS ORDERED that this matter is dismissed.

DATED this 29 day of October, 1992.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE,
United States District Court

Notice: The portion noted as missing from the District Court Clerk's copy of the Memorandum and Order, as supplied on pages A-12 and A-13, supra, and as found in 807 F.Supp. @90, was officially made part of the record below by an Amendment to Memorandum and Order filed January 20, 1993 by the District Clerk's office. Said Amendment was signed by Judge CAMBRIDGE on January 20, 1993.